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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID CHAVEZ-RAMIREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The Ninth Circuit Court Of Appeals.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should grant review to resolve the conflict between this Court's and the United States Courts of Appeals for the First, Third, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits' construction of a defendant's due process rights, upholding a convicted defendant's constitutional right to be sentenced on the basis of accurate information, and the Ninth Circuit's directly conflicting and egregiously incorrect construction in this case, permitting the Petitioner to be sentenced on the basis of materially false information?

Whether this Court should grant review to resolve the conflict between this Court's and the United States Courts of Appeals for the Fourth, Seventh, Eighth and Eleventh Circuits' construction of a defendant's Sixth Amendment rights requiring that in all criminal prosecutions a defendant has the right to effective assistance of counsel, and the Ninth Circuit's directly conflicting and egregiously incorrect construction in this case, permitting the Petitioner to be sentenced in the absence of effective assistance of counsel?

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David Chavez-Ramirez respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is attached. [App. 1-3] The judgment of the United States District Court for the District of Alaska is unreported and is attached. [App. 25-39]

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JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its decision on November 19, 1997. On February 11, 1998, that court denied Mr. Chavez-Ramirez' timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Introduction and Summary of Argument

In Townsend v. Burke, 334 U.S. 736 (1948), this Court held that due process guarantees a convicted criminal the right not to be sentenced on the basis of materially false information. The Court decreed that "[s]uch a result, whether caused by carelessness or design, is inconsistent with due process of law, and such conviction cannot stand." Id. at 741.

In the present case, the record clearly demonstrates that Chavez-Ramirez' Presentence Investigation Report ("PSIR") contained material misinformation about his criminal record and an incorrect core calculation of his criminal history. The PSIR materially overstated Chavez-Ramirez' offense conduct, indicating two convictions for a Class B felony under state law for misconduct involving a controlled substance, when in fact one of the convictions was a Class C felony. The PSIR also contained an incorrect core calculation of Chavez-Ramirez' criminal history which elevated him an entire category in the PSIR's criminal history computation.

The sentencing transcript clearly indicates that the district court relied on the foregoing inaccurate information in passing sentence, and the inaccurate information formed part of the basis for the sentence. It is manifest from the sentencing judge's remarks that his mistaken belief that he made a two level criminal history departure weighed heavily in his refusal to make any adjustment with regard to Chavez-Ramirez' Offense Level. The sentencing judge's reasoning that he "already made one adjustment from the indicated Guideline

sentencing range by reducing the technically correct criminal history category six to a category of four" and therefore did "not see a sufficient basis for making any further adjustment" demonstrates the court's reliance on this materially false information in passing sentence.[1] [App. 13] (emphasis added).

The fact that Chavez-Ramirez' sentence might have been justified by other, accurate, information, and the fact that the district court departed from criminal history category six to category four is irrelevant given that the court clearly relied on materially false information as part of the basis for the sentence. As this Court held in United States v. Tucker, 404 U.S. 443 (1972), the issue is "whether the sentence . . . might have been different" if the sentencing judge had been correctly informed. Id. at 448 (1972). In the present case, the district court's stated reliance on materially false information in imposing sentence on Chavez-Ramirez is an unequivocal fact, and thus, it is clear that Chavez-Ramirez' due process rights have been violated.

Indeed, as recognized by the Ninth Circuit's opinion, the United States conceded that the PSIR was erroneous [App. 2], however, inexplicably still asserted that despite these errors and a sentencing procedure during which the sentencing court specifically and expressly relied on this materially false information in sentencing Petitioner, the result should be affirmed.

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[1] In fact, the Criminal History Category VI calculated by the PSIR is incorrect. A proper application of the Sentencing Guidelines produces a Criminal History Category of V. See footnote 5, infra. Thus, the district court mistakenly believed it made a two level departure when in actuality the court departed only one level.

Moreover, the Ninth Circuit's conclusion that "the district court would have imposed the same sentence had it not relied upon the incorrect criminal history point calculation" [App. 3] reveals the Ninth Circuit's judgment that, in fact, the district court did rely upon this materially false information in sentencing Petitioner. Inexplicably, however, the Ninth Circuit affirmed Chavez-Ramirez' sentence. This result is contrary to the protections afforded by the Due Process Clause and directly conflicts with this Court's opinions in Townsend and Tucker.

The Sixth Amendment guarantees that in all criminal prosecutions "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This Court has held that to demonstrate ineffective assistance of counsel, a petitioner must show 1) his counsel's performance was unreasonable under prevailing professional standards; and 2) there is a reasonable probability that but for counsel's unprofessional errors, the results would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984).

In the present case, Chavez-Ramirez' sentencing counsel's inadequate preparation for sentencing insofar as it resulted in consideration of inaccurate information present in the presentence investigation report constitutes ineffective assistance of counsel. Chavez-Ramirez' sentencing counsel's failure to object to the material misinformation contained in the PSIR regarding his criminal record, combined with counsel's failure to object to the incorrect core calculation of his criminal history which resulted in the sentencing court's reliance on this erroneous information in imposing sentence upon Chavez-Ramirez, violates the standard articulated by the Court in Strickland.

Chavez-Ramirez' sentencing counsel's failures relate to a total lack of preparation on what clearly would be a central issue at sentencing, the calculations giving rise to the applicable sentencing range. The record plainly demonstrates that a reasonable probability exists that but for sentencing counsel's errors, Chavez-Ramirez' sentence would have been different. If the sentencing judge had not relied upon the mistaken belief that the court made a two level departure in deciding not to make "any further adjustment" with regard to Chavez-Ramirez' Offense Level, then the sentencing judge would not have explicitly stated "[h]ere I have already made one adjustment from the indicated Guideline sentencing range by reducing the technically correct criminal history category six to a category of four . . . I do not see a sufficient basis for making any further adjustment here." [App. 13] (emphasis added).

It is indisputable that the PSIR contained materially false information about Chavez-Ramirez' criminal record and an incorrect core calculation of his Criminal History Category. The district court clearly relied on this inaccurate information in imposing sentence upon Chavez-Ramirez, and sentencing counsel failed to provide effective assistance of counsel insofar as counsel's inadequate preparation resulted in the district court's consideration and reliance on the misinformation.

The profound conflict between this Court's opinions in Townsend, Tucker, and Strickland, as well as numerous opinions from the United States Courts of Appeals, and the Ninth Circuit centers on a fundamental and egregiously incorrect difference in the Ninth Circuit's construction of a defendant's Due Process and Sixth Amendment rights.

In order to resolve these critical conflicts, this Court should grant review and enforce Petitioner's constitutionally mandated Due Process and Sixth Amendment rights.

B. Facts

Mr. Chavez-Ramirez is a 42 year old citizen of Mexico. He resided in Alaska as a permanent resident alien bidding and working on United States Forest Service thinning and reforestation contracts. [App. 116] Mr. Chavez-Ramirez supported his mother as well as four additional dependents with his income from this work. [App. 81, 119]

On November 22, 1993, in the Superior Court for the State of Alaska, at Juneau, Alaska, Mr. Chavez-Ramirez pled guilty and was convicted of Misconduct Involving a Controlled Substance in the third degree, a class B felony, in violation of Alaska Statute § 11.71.030(a)(1) in Case No. 1JUS-93-541CR, and Misconduct Involving a Controlled Substance in the fourth degree, a class C felony, in violation of Alaska Statute § 11.71.040(a)(2), in Case No. 1JUS-93-1002CR. [App. 95-99; 100-105]

On November 22, 1993, the Honorable Larry Weeks, State of Alaska Superior Court Judge, sentenced Chavez-Ramirez to three years imprisonment, with two years suspended, and three years of probation in Case No. 1JU-S93-541CR, and two years imprisonment, with one year suspended, and three years of probation in Case No. 1JU-S93-1002CR. [App. 95-99; 100-105]

Following his release from state custody, Chavez-Ramirez was deported from the United States to his home country of Mexico on March 22, 1995. [App. 66-67] In September 1995, Chavez-Ramirez reentered the United States

through San Ysidro, California. [App. 67] On December 30, 1995, Chavez-Ramirez, who was on state probation from the Superior Court for the State of Alaska at Juneau, Alaska, was found present in Juneau, Alaska, was arrested for probation violations and incarcerated at the Lemon Creek Correctional Center in Juneau, Alaska. [App. 64]

On December 26, 1995, the State of Alaska filed a Petition to Revoke Chavez-Ramirez' probation resulting from his November 22, 1993, convictions. [App. 41] On May 24, 1996, Chavez-Ramirez' probation was revoked based upon his admission of a violation of a condition of his probation by reentering the United States after deportation in violation of 8 U.S.C. § 1326. [App. 40-42] Alaska Superior Court Judge Larry Weeks revoked the suspended portion of the sentence imposed in Case No. 1JU-S93-541CR sentencing Chavez-Ramirez to a total of two years in that case and terminated Chavez-Ramirez' probation in Case No. 1JU-S93-1002CR. [App. 40-42; 54-56] Thus, Chavez-Ramirez was sentenced to one additional year of imprisonment, in Case No. 1JU-S93-541CR, above what he had previously served. [App. 40-42; 55] Judge Weeks imposed no additional prison time in Case No. 1JU-S93-10002CR.[2] [App. 55-56]

On February 20, 1996, the Grand Jury for the District of Alaska returned an Indictment charging Chavez-Ramirez with Unlawful Reentry of an Alien Previously Deported Following

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[2] Judge Weeks reiterated the fact that he did not impose any additional prison time upon Chavez-Ramirez in Case No. 1JU-S93-1002CR in the court's September 23, 1996, Memorandum. [App. 58-60]

Conviction for an Aggravated Felony in violation of 8 U.S.C. §§ 1326(a) and (b)(2). [App. 64]

On May 8, 1996, Chavez-Ramirez appeared before the Honorable John W. Sedwick, United States District Court Judge, and pled guilty to the charge in the Indictment, Unlawful Reentry of an Alien Previously Deported Following a Conviction for an Aggravated Felony in violation of 8 U.S.C. §§ 1326(a) and (b)(2), pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. [App. 65]

A Presentence Investigation Report was prepared by the Probation Department and filed with the Court. The PSIR contained material misinformation concerning Chavez-Ramirez' Offense Conduct as follows:

> On November 22, 1993, in the Superior Court for the State of Alaska, at Juneau, Alaska, David Chavez-Ramirez was convicted of the offense of Misconduct Involving a Controlled Substance in the third degree in that Chavez-Ramirez did knowingly deliver or possess with intent to deliver a Schedule IIA controlled substance, namely cocaine, and of the offense of Misconduct Involving a Controlled Substance in that he did knowingly deliver or possess with intent to deliver a Schedule VIA controlled substance, namely marijuana. Both offenses were in violation of Alaska Statute 11.71.030(a)(1).

[App. 66] (emphasis added).

In fact, Chavez-Ramirez was convicted for knowingly delivering or possessing with intent to deliver a Schedule VIA controlled substance, which, under Alaska Statutory law is Misconduct in the Fourth degree and a violation of Alaska

Statute § 11.71.040(a)(2). [App. 100; 107; 109[3]] Thus, the PSIR materially overstated Chavez-Ramirez' offense conduct.

The PSIR included the following convictions as part of Chavez-Ramirez' criminal history in calculating that Chavez-Ramirez belonged in Criminal History Category VI:

10/26/87	Case No. 1KA-S87-58 1 point Driving While Intoxicated Kake, Alaska
09/11/92	Case No. 1KE-92-101 1 point Disorderly Conduct Ketchikan, Alaska
09/11/92	Case No. 1SI-92-216 1 point Driving While Intoxicated Sitka, Alaska
09/20/93	1JU-93-857 1 point Criminal Trespass Juneau, Alaska

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[3] The November 22, 1993, Judgment of Conviction correctly indicates that Chavez-Ramirez plead no contest to Misconduct Involving a Controlled Substance in the Fourth Degree, however, it erroneously indicates that this is a violation of AS § 11.71.030(a)(1). [App. 100] The Judgment of Conviction further provides "IT IS ADJUDGED that the defendant is guilty of Misconduct Involving a Controlled Substance in the Fourth Degree as charged in the indictment and convicted." [App. 100-101]

11/22/93 1JU-S93-541
3 points
Misconduct Involving a Controlled Substance in the Third Degree
Juneau, Alaska

11/22/93 1JU-S93-1002CR
3 points[4]
Misconduct Involving a Controlled Substance in the Fourth Degree
Juneau, Alaska

Instant offense occurred while on active probation for the sentences of November 22, 1993. 2 points.

Instant offense occurred within two years of release from custody on October 19, 1994, for the sentences of November 22, 1993. 1 point.

[App. 71-76] The thirteen points above placed Chavez-Ramirez in criminal history category VI pursuant to the United States Sentencing Guidelines ("U.S.S.G.") Chapter 5, Part A. [App. 76]

The PSIR, however, incorrectly calculated the points properly attributed to Mr. Chavez-Ramirez' conviction in Case No. 1JU-S93-1002CR. The PSIR assigned three points for this conviction pursuant to U.S.S.G. §§ 4A1.1(a) and 4A1.2(k). In fact, only two points should have been added pursuant to a

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[4] A review of Sentencing Guidelines sections 4A1.1(a) and 4A1.2(k) reveals that assigning three criminal history points to Case No. 1JU-S93-1002CR is an error. A correct application of these sections results in the assignation of two criminal history points.

correct application of the Sentencing Guidelines.[5] Thus, the erroneous addition of one extra point to Chavez-Ramirez'

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[5] U.S.S.G. § 4A1.1 provides that the total points from items (a) through (f) determine the criminal history in the Sentencing Table. U.S.S.G. § 4A1.1(a) directs the court to "[a]dd 3 points for each prior sentence of imprisonment exceeding one year and one month. Section 4A1.1(b) directs the court to "[a]dd 2 points for each prior sentence of imprisonment at least sixty days not counted in (a)." U.S.S.G. § 4A1.2(k)(1) further directs as follows:

> In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for § 4A1.1(a), (b), or (c) as applicable.

On November 23, 1993, in Case No. 1JU-S93-1002CR, State Superior Court Judge Larry Weeks sentenced Chavez-Ramirez to a two year sentence of imprisonment with one year suspended. [App. 40-42] U.S.S.G. § 4A1.2(b) defines "sentence of imprisonment" for the purpose of computing criminal history points as "only the portion that was not suspended" if a "a part of the sentence was suspended." During the May 24, 1996, imposition of sentence for Chavez-Ramirez' probation violations, State Superior Court Judge Larry Weeks imposed no additional prison time in this case. [App. 40-42; 54-56] On September 23, 1996, Alaska State Superior Court Judge Larry Weeks issued a memorandum reiterating his May 24, 1996, judgment wherein he sentenced Chavez-Ramirez to a total of one additional year of imprisonment in Case No. 1JU-S93-541CR and terminated Chavez-Ramirez' probation in Case No. 1JU-S93-1002CR. [App. 58-60]

The PSIR's finding contained in paragraph 34 "05/24/96: prob. revoked, deft. to serve 1 yr. jail consecutive to Case no. 1JU-S93-541" [App. 75] is clearly erroneous. Therefore, pursuant to U.S.S.G. § 4A1.1(b) only two points are assigned to the November 23, 1993, conviction in Case

(continued...)

Criminal History resulted in elevating him an entire category in the Criminal History computation.

The PSIR further calculated a Total Offense Level of 21 based upon a Base Offense Level of 8 pursuant to U.S.S.G. § 2L1.2. [App. 69-70] Therefore, at an offense level 21, Chavez-Ramirez' 13 incorrectly calculated criminal history points produced a sentencing range of 77 to 96 months. U.S.S.G. Ch.5 Pt. A. [App. 82]

At sentencing, the district court stated "the criminal acts shown in the criminal history and the individual's character as reflected in the other sources of information simply cannot justify his classification into either a [criminal history] category six or even a [criminal history] category five." [App. 9] The district court held that Criminal History Category six as well as Criminal History Category five "would seriously overstate" Chavez-Ramirez' criminal propensity, and thus, made the departure to put Chavez-Ramirez into Criminal History Category four. [App. 11-12]

The court refused, however, to make a downward departure under U.S.S.G. § 5K.2. The court reasoned:

> Here, I have already made one adjustment from the indicated Guideline sentencing range by reducing the technically correct criminal history category six to a category of four.[6] While I believe I have further authority under Section 5K2.0 to reduce the offense level if the

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(...continued)

No. 1JU-S93-1002CR. A correct application of the U.S.S.G. places Chavez-Ramirez in Criminal History Category V.

[6] See supra, footnote 1.

> defendant's circumstances have not been adequately considered in the Guidelines, I do not see a sufficient basis for making any further adjustment here.

[App. 13] (emphasis added)

The District Court proceeded to sentence Chavez-Ramirez to 57 months to run concurrently with the term of imprisonment Chavez-Ramirez was serving in the State of Alaska. [App. 20, 27]

C. Proceedings Below

On February 21, 1996, Chavez-Ramirez was indicted by a grand jury in the District of Alaska on one count of a violation of 8 U.S.C. §§ 1326(a) and (b)(2), Unlawful Reentry of an Alien Previously Deported Following Conviction for an Aggravated Felony. On May 8, 1996, Chavez-Ramirez pled guilty to Unlawful Reentry of an Alien Previously Deported Following a Conviction for an Aggravated Felony in violation of 8 U.S.C. §§ 1326(a) and (b)(2), pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. On July 26, 1996, he was sentenced to 57 months of imprisonment under the United States Sentencing Guidelines by the Honorable John W. Sedwick, United States District Court Judge for the District of Alaska. [App. 20, 27]

Chavez-Ramirez filed a timely appeal to the United States Court of Appeals for the Ninth Circuit challenging the incorrect application of the United States Sentencing Guidelines, the resulting 57 month sentence, the district court's reliance, during imposition of sentence, on a PSIR which contained material misinformation regarding his criminal record and an incorrect core calculation regarding his criminal history,

and the ineffective assistance of his counsel insofar as it resulted in the district court's reliance on such false information.

The Ninth Circuit affirmed the District Court's ruling in a memorandum opinion filed November 19, 1997. [App. 1-3] Chavez-Ramirez' timely filed petition for rehearing was denied on February 11, 1998.

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REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court should grant this petition because the Ninth Circuit desperately needs clarification of the appropriate construction of a convicted defendant's constitutional right to be sentenced on the basis of accurate information. Furthermore, the Ninth Circuit possesses a flawed understanding of the appropriate construction of a defendant's Sixth Amendment right to the effective assistance of counsel. The findings of the Ninth Circuit in this case support review.

First, the Ninth Circuit concluded that despite a sentencing procedure during which the district court specifically and expressly relied on materially false information in pronouncing sentence, such sentence should be affirmed. Second, the Ninth Circuit, in so ruling, ensured that the district court would be denied the opportunity to make whatever downward adjustment might be appropriate upon an accurate record. Third, the Ninth Circuit concluded that despite sentencing counsel's inadequate preparation for sentencing and

counsel's failure to object to the presentation of materially false information which resulted in its consideration by the district court, Chavez-Ramirez was not prejudiced by sentencing counsel's deficient performance. Finally, the Ninth Circuit observed that the district court "would have imposed the same sentence had it not relied upon the incorrect criminal history point calculation," thus, revealing the Ninth Circuit's judgment that the sentencing court did in fact rely on the erroneous information in deciding Chavez-Ramirez' sentence.

The Ninth Circuit reached this remarkable result by ignoring the plain language of this Court's opinions and decades of uniform judicial construction by the United States Courts of Appeals.

The Ninth Circuit's decision in *Chavez-Ramirez* exacerbates the irreconcilable conflict between this Court and the Ninth Circuit on two significant issues: 1) the constitutional entitlement of a convicted defendant to a fair sentencing process based upon an accurate record; and 2) the constitutional entitlement of a defendant in all criminal prosecutions to have the effective assistance of counsel for his defense.

This Court should grant certiorari, and at a minimum, the sentencing court should be afforded the opportunity to sentence Chavez-Ramirez upon an accurate record and make whatever downward adjustment might be appropriate.

I. *THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS COURT AND THE NINTH CIRCUIT HAVE DIRECTLY CONFLICTING DECISIONS ON THE APPROPRIATE CONSTRUCTION OF A CONVICTED DEFENDANT'S DUE PROCESS RIGHT TO BE SENTENCED UPON THE BASIS OF ACCURATE INFORMATION THAT CAN ONLY BE RESOLVED BY THIS COURT.*

It is well settled that sentences based upon erroneous and material information or assumptions violate due process and that a new sentencing hearing is required where the trial court has relied on such information or assumptions. United States v. Darby, 744 F.2d 1508 (11th Cir. 1984); cert. denied, 471 U.S. 1100 (1985), Larson v. United States, 835 F.2d 169, cert. denied, 108 S.Ct. 2824 (8th Cir. 1987); Nichols v. United States, 75 F.3d 1137 (7th Cir. 1996); United States v. Mueller, 902 F.2d 336 (5th Cir. 1990).

This Court has held that convicted defendants have a due process right to be sentenced on the basis of accurate information. United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948). A foundation of that right is due process protection against arbitrary government decisions. While a convicted defendant does not have a constitutional right to a particular sentence, the offender does have a right to a fair sentencing process in which the court goes through a rational procedure of selecting a sentence based upon relevant considerations and accurate information. United States v. Lane, 738 F.2d 863, 864-65 (7th Cir. 1984). See also United States v. Pellerito, 918 F.2d 999

(1st Cir. 1990) (holding convicted defendants, including those who pled guilty, have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information).

In Tucker, this Court reinforced a convicted defendant's right to accuracy in the sentencing process. The Court affirmed the court of appeals decision vacating the sentence:

> For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in Townsend v. Burke, 334 U.S. 736, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." Id. at 741.

Id. at 446. (emphasis added). Thus, under Townsend and Tucker, a sentence must be set aside where the defendant can show that false information was part of the basis for the sentence.

In the present case, the record clearly establishes that the PSIR contained material misinformation about Chavez-Ramirez' criminal record and an incorrect core calculation of his criminal history. Furthermore, the sentencing transcript leaves no doubt that the district court relied on the foregoing misinformation in passing sentence and the misinformation formed part of the basis for the sentence. The sentencing court's reliance on the false information is explicit and incontrovertible. The sentencing judge "adopt[ed] the presentence report's factual statements" finding them "well supported by the available information." [App. 9] Before

pronouncement of sentence on Chavez-Ramirez, the sentencing judge explained as follows:

> Here I have already made one adjustment from the indicated Guideline sentencing range by reducing the technically correct criminal history category six to a category of four. While I believe I have further authority under Section 5K2.0 to reduce the offense level if the defendant's circumstances have not been adequately considered in the guidelines, I do not see a sufficient basis for making any further adjustment here.

[App. 13]

The sentencing judge's comments plainly indicate that he did not rely merely in a general way on the fact of Chavez-Ramirez' prior convictions for Misconduct Involving a Controlled Substance. To the contrary, he emphasized the prior convictions as "not one but two prior drug convictions." [App. 13] Thus, the PSIR's classification of both convictions as violations of Alaska Statute § 11.71.030, a more serious "Class B" felony, clearly prejudiced Chavez-Ramirez. See Prichard v. Lockhart, 990 F.2d 352, 54 (8th Cir. 1993) ("classifying the offense as a third offense and thus a more serious Class C felony, instead of the lesser Class D felony for a second offense, clearly prejudiced Prichard, as there is a reasonable probability that Prichard's sentence would have been different").

Moreover, it is manifest that the sentencing judge's mistaken belief that he made a two level criminal history departure weighed heavily in the judge's refusal to make any adjustment with regard to Chavez-Ramirez' Offense Level.

The sentencing judge's explicit assertion that he "already made one adjustment from the indicated Guideline sentencing range by reducing the technically correct criminal history category six to a category of four" and therefore did "not see a sufficient basis for making any further adjustment" demonstrates his reliance on this materially false information in passing sentence. [App. 13]

In addition, the sentencing judge clearly wanted to depart downward two levels with regard to Chavez-Ramirez' criminal history. In fact, the court actually departed only one level, thus frustrating the sentencing judge's expressed intent. Because the sentencing court both failed to accomplish its stated goal and subsequently relied on its mistaken belief that it had made a two level departure in declining to make any "further" departure, at a minimum, the sentencing court should be accurately apprised of Chavez-Ramirez' criminal record and criminal history, and be afforded an opportunity to make whatever downward adjustment might be appropriate upon an accurate record.

In Barton v. Lockhart, 762 F.2d 712 (8th Cir. 1985), the presentence report relied on by the state court sentencing judge was erroneous in that it incorrectly overstated the defendant's criminal record. The Court of Appeals for the Eight Circuit reversed the district court's denial of a habeus corpus petition and remanded to the district court with instructions to issue the writ of habeus corpus unless the state, using a corrected presentence report, resentenced the defendant within 90 days.

Relying on this Court's opinion in Townsend, the court held that a defendant is denied due process if his sentence is based upon a materially false presentence report and the defendant has no meaningful opportunity to rebut the

inaccuracies. The Eighth Circuit held that the sentencing judge justifiably relied on the presentence report, but where the report contained material misinformation about the defendant's criminal record, in that the presentence report erroneously showed parole violations, and where the record indicated that the judge relied on such erroneous information in deciding what sentence to give the defendant, the defendant was denied due process, and a new sentencing hearing was required.

Likewise, in the present case, the PSIR contained materially false information concerning both Chavez-Ramirez' criminal record and criminal history and the transcripts from the sentencing hearing distinctly reveal that the sentencing judge's reliance on the erroneous information was instrumental in deciding what sentence to give Chavez-Ramirez.

Due process may also be denied in a criminal proceeding by sentencing on the basis of information whose accuracy the defendant has not had fair chance to challenge. United States v. Inglesi, 988 F.2d 500 (4th Cir. 1993); United States v. Barnhart, 980 F.2d 219 (3d Cir. 1992). In the present case, the record clearly demonstrates that the defendant was not given a full and fair opportunity to reveal or refute the inaccuracies in the information relied upon by the sentencing court.

Chavez-Ramirez was unaware of the inaccurate Criminal History Category computation in sufficient time to petition the district court pursuant to Rule 35(c) for a correction. Chavez-Ramirez is a citizen of Mexico and naturally his primary language is Spanish. He is not fluent in the English language and utilized interpreters in conversations with his sentencing counsel, at his change of plea hearing and at the imposition of sentence. Chavez-Ramirez was unaware of the material misinformation contained in his PSIR, and his sentencing

counsel made no objection to its presence in the PSIR or to the district court's explicit reliance upon such misinformation in imposing sentence upon him. See argument II, infra. Thus, Chavez-Ramirez has been denied an adequate opportunity to challenge erroneous information upon which the district court based his sentence.

Townsend holds, however, that a defendant is denied due process if his sentence his based upon a materially false presentence report and the defendant has no meaningful opportunity to rebut the inaccuracies. In Townsend, this Court directed that "[s]uch a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." Id. at 741.

The Ninth Circuit's analysis in affirming Chavez-Ramirez' sentence is unsound. It is indisputable that the PSIR contained material misinformation about Chavez-Ramirez' criminal record and a incorrect core calculation of Chavez-Ramirez' criminal history. The district court clearly relied on this material misinformation in imposing sentence on Chavez-Ramirez.

The factors relied upon by the Ninth Circuit in reaching its decision are unpersuasive. The court "reject[ed] Chavez-Ramirez' contention that the district court meant to depart downward two Categories regardless of any computational errors in the PSR." [App. 3] Indeed, the district court was not aware that there were errors in the PSIR. The court expressly stated its intent to reduce "the technically correct criminal history category six to a category of four." [App. 13] In fact, the PSIR's indicated criminal history category was not "technically correct." It was dead wrong. Moreover, the district court's unequivocal, stated intention was to depart

downward two levels from the correct category, thus, the Ninth Circuit's presumption that the sentencing judge did not mean what he said is wholly inappropriate.

Finally, the Ninth Circuit's conclusion that "the district court would have imposed the same sentence had it not relied upon the incorrect criminal history point calculation" [App. 3] is flawed and underscores the need for review by this Court.

In Tucker, 404 U.S. 443, this Court rejected an argument analogous to the rationale advanced by the Ninth Circuit in the present matter. The Tucker Court acknowledged that "the prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue," and "[t]he record . . . makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him." Id. at 447. The Court rejected the argument that the sentence need not be set aside because, in light of the entire record, it was "highly unlikely" that a new, untainted sentencing would be any different, and held that resentencing was required because it simply could not be assumed that the sentencing court would again give the same sentence. Id. at 446, 448-89, n.8. See also United States ex. rel. Jackson v. Myers, 374 F.2d 707, 711 (3d Cir. 1967) (reviewing court could not assume that judge did not rely on misstatements regarding criminal record).

Likewise, in Townsend v. Burke, this Court held that a reviewing court cannot independently review the accurate information and conclude that the original sentence is still justified. The Townsend Court admonished:

> We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving.

334 U.S. 736, 740 (1948). Accordingly, this Court should grant review in the present case.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS COURT AND THE NINTH CIRCUIT HAVE DIRECTLY CONFLICTING DECISIONS ON THE CONSTRUCTION OF A DEFENDANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE THAT CAN ONLY BE RESOLVED BY THIS COURT.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This Court has instructed that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Strickland, 466 U.S. at 685. "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Id.

This Court has held that to demonstrate ineffective assistance of counsel, a petitioner must show 1) his counsel's performance was unreasonable under prevailing professional standards; and 2) there is a reasonable probability that but for counsel's unprofessional errors, the results would have been different. Id. at 687. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." Id. In the present case, Chavez-Ramirez' sentencing counsel's

performance at the sentencing hearing violates the standard set forth by this Court in Strickland.

"Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, ...counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)). This presumption is inappropriate, however, if counsel's strategic decisions are made after an inadequate investigation. Wajda v. United States, 64 F.3d 385, 387 (8th Cir. 1995). See also Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1449), cert. denied, 503 U.S. 952 (1992) (quoting Strickland, 466 U.S. at 691) ("merely invoking the word strategy to explain errors was insufficient since 'particular decisions must be directly assessed for reasonableness in light of all the circumstances'").

This Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Counsel is ineffective where an attorney neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so. See United States v. Barnes, 83 F.3d 934 (7th Cir. 1996), cert. denied, 117 S. Ct. 156 (1996) (citing McMann v. Richardson, 397 U.S. 759, 769-71 (1970)) ("A defendant can prove that his attorney's performance was deficient if he shows that his attorney did not make a good-faith effort to discover the facts relevant to his

sentencing, to analyze those facts in terms of the applicable legal principles and to discuss that analysis with him.").

While courts are properly deferential to an attorney's discretion, failure to raise an objection to a clear and indisputable error in the Presentence Investigation Report is not within the broad range of performance that can be deemed reasonable. See United States v. Beatty, 35 F.3d 557, 1994 WL 481912 (4th Cir. Sept. 7, 1994) (finding Strickland violation where attorney failed to file written objections to presentence report); United States v. Hanger, 991 F.2d 791, 1993 WL 128015 (4th Cir. 1993) (finding Strickland violation where attorney failed to object to errors in presentence report).

In the present case, the record clearly establishes that the PSIR contained materially false information. See supra pp. 8-12. Chavez-Ramirez' sentencing counsel's inadequate preparation for sentencing and counsel's ensuing failure to object to the material misinformation contained in the PSIR regarding his criminal record, combined with counsel's failure to object to the incorrect core calculation of his criminal history which resulted in the sentencing court's reliance on this erroneous information in imposing sentence upon Chavez-Ramirez constitutes ineffective assistance of counsel.

In Prichard v. Lockhart, 990 F.2d 352 (8th Cir. 1993), the Court of Appeals for the Eighth Circuit held that defense counsel was ineffective in failing to object to the sentencing court's use of an out of state marijuana conviction to enhance defendant's sentence for possession of marijuana. The court reasoned that although the case holding that a defendant's previous out of state marijuana conviction was not a violation of the Arkansas code and could not be used to increase the offense level under the statute was decided after Prichard's

sentencing, and thus, was not available to Prichard's trial counsel at sentencing, "it was objectively unreasonable for counsel to ignore the plain language of the statute and to fail to object when the trial court inappropriately used . . . [the] conviction to enhance his sentence." Id. at 354. The court also held that "classifying the offense as a third offense and thus a more serious Class C felony, instead of the lesser Class D felony for a second offense, clearly prejudiced Prichard, as there is a reasonable probability that Prichard's sentence would have been different but for counsel's ineffectiveness." Id.

Similarly, in United States v. Ford, 918 F.2d 1343, 1350 (8th Cir. 1990), the Court of Appeals for the Eight Circuit held that defense counsel's error in failing to object to the absence of consideration of acceptance of responsibility warranted reversal of the defendant's sentence even though at the time the presentence report was prepared such a reduction was not possible. The court found that the defendant was denied effective assistance of by trial counsel's failure to object to the base offense level at the sentencing hearing on the ground of defendant's acceptance of responsibility. The court reasoned that "trial counsel's failure to object a the sentencing to a base offense level was equivalent to Ford's having no trial counsel at all." Id. at 1350. The Court continued:

> In Ford's case, counsel's error was so serious that it deprived Ford of a fair sentence. Had Ford's trial counsel objected to the base offense level of 34, it is possible the district court would have modified the level to reflect Ford's acceptance of responsibility.

Id.

Likewise, in the present case, sentencing counsel's failure to object to the material misinformation contained in the PSIR regarding Chavez-Ramirez' criminal record, combined with counsel's failure to object to the incorrect core calculation of Chavez-Ramirez' criminal history which resulted in the sentencing court's reliance on this erroneous information in imposing sentence upon Chavez-Ramirez constitutes ineffective assistance of counsel.

It is undeniable that Chavez-Ramirez' prior criminal record would inevitably be the focus of his sentencing hearing. The entire scheme of the United States Sentencing Guidelines is based in large part upon the calculation of a defendant's criminal history for purposes of determining the applicable sentencing range. Chavez-Ramirez' sentencing counsel's failure to prepare herself to deal with Chavez-Ramirez' criminal history in an informed, detailed and factual manner falls significantly below the performance expected of an ordinary attorney participating in a sentencing hearing. See Cabello v. United States, 884 F.Supp. 298, 302 (N.D.Ind. 1995) (trial counsel's failure to object to incorrect application of sentencing guidelines constituted "subpar representation" and materially prejudiced petitioner).

Chavez-Ramirez' sentencing counsel's failure to object to the materially false information contained in Chavez-Ramirez' PSIR does not relate to tactical decisions or matters of judgment regarding how to best present Chavez-Ramirez' case at the sentencing hearing. Rather, sentencing counsel's errors relate to a total lack of preparation on what clearly would be a central issue at sentencing, the calculations giving rise to the applicable sentencing range. Adequate preparation by sentencing counsel would have revealed the material

misinformation contained in the PSIR regarding Chavez-Ramirez' criminal record and the incorrect core calculation of Chavez-Ramirez' criminal history.

The record clearly demonstrates specifically how sentencing counsel's failure to object to the erroneous addition of one additional point to Chavez-Ramirez' criminal history resulted in prejudice to Chavez-Ramirez. The district court mistakenly believed it made a two level departure when, in fact, the court departed only one level. The court's mistaken belief, however, formed part of the basis for the sentence the court imposed. Given the sentencing judge's reasoning that "[h]ere I have already made one adjustment from the indicated Guideline sentencing range by reducing the technically correct criminal history category six to a category of four . . . I do not see a sufficient basis for making any further adjustment," [App. 13] there is a reasonable probability that had the sentencing judge known of the error in the core calculation of Chavez-Ramirez' criminal history which elevated him one entire category, further departure may have been made resulting in a lesser sentence for the defendant. See United States v. Ford, 918 F.2d 1343, 1350 (8th Cir. 1990) (trial counsel's failure to object to incorrect offense level "was so serious that it deprived Ford of a fair sentence").

Thus, the Ninth Circuit's conclusion that Chavez-Ramirez was "not prejudiced by his counsel's failure to object" [App. 3] to the erroneous and materially false information contained in his PSIR is directly contradicted by the record, and violates the standard promulgated by this Court in Strickland. As this Court held in Tucker, the issue is "whether the sentence . . . might have been different" if the sentencing judge had been correctly informed. Id. at 448.

Assessing the cumulative effect of Chavez-Ramirez' sentencing counsel's errors, it is clear that his counsel's performance was seriously deficient, and that there is a reasonable probability that, absent these errors, the result of the sentencing would have been different.

This Court has acknowledged that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984). The Court emphasized, however, that "'[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel.'" Id. (quoting McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). If effective assistance is not actually provided, then the constitutional guarantee has been violated. To hold otherwise:

> could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.

Id. at 654.

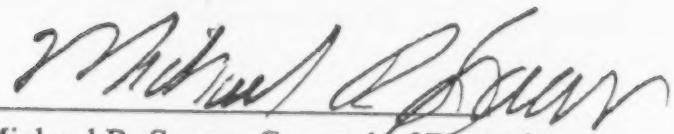
◆

CONCLUSION

For the reasons set forth in the petition, this Court should grant a writ of certiorari to Petitioner David Chavez-Ramirez. Alternatively, this Court should summarily reverse the decision below.

Respectfully Submitted this 8th day of May, 1998.

Bogle & Gates P.L.L.C.
Attorneys for Petitioner
David Chavez-Ramirez



Michael R. Spaan, Counsel of Record
Barat M. LaPorte

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

DAVID CHAVEZ-RAMIREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The Ninth Circuit Court Of Appeals.

APPENDIX VOLUME I

Michael R. Spaan, Counsel of Record
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 96-30242
v.	D.C. No. CR-96-00009-01-JWS
DAVID CHAVEZ-RAMIREZ, Defendant-Appellant.	MEMORANDUM *

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding
Submitted November 17, 1997 **

Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, appellant's request for oral argument is denied.

David Chavez-Ramirez appeals from his 57-month sentence imposed following his guilty plea to Unlawful Reentry of an Alien Previously Deported Following Conviction for an Aggravated Felony (8 U.S.C.§§ 1326(a) and (b)(2)). We have jurisdiction under 28 U.S.C.§ 1291, and affirm.

I. **Erroneous Calculation of Criminal History Points**

Chavez-Ramirez contends that his due process rights were violated at sentencing because the district court relied on a Presentence Investigation Report ("PSR") that incorrectly calculated his criminal history points. We disagree.

"[I]n determining whether a remand is required where the sentence was imposed as a possible result of an incorrect application of the sentencing guidelines, the court of appeals must determine whether a district court would have imposed the same sentence had it not relied upon the invalid factor or factors." United States v. Sherwood, 98 F.3d 402, 414 (9th Cir. 1996) (citing Williams v. United States, 503 U.S. 193, 201 (1992)). The government concedes that the PSR incorrectly added one criminal history point, and that therefore Chavez-Ramirez's statutorily correct Criminal History Category was V instead of VI as stated in the PSR. While the district court was unaware of the error, it granted defense counsel's request to depart downward to Category IV under U.S.S.G. § 4A1.3 on the finding that "Category VI as well as V would seriously overstate his criminal propensity and that Category IV is appropriate."

Because the district court's decision to depart downward was based on the finding that Category IV was appropriate and more accurately represented Chavez-Ramirez's criminal history,

we reject Chavez-Ramirez's contention that the district court meant to depart downward two Categories regardless of any computational errors in the PSR. See id. Furthermore, Chavez-Ramirez does not indicate how the PSR's incorrect calculation of his criminal history points had any effect on the district court's decision not to depart downward from the base offense level of 24. Because we can conclude that the district court would have imposed the same sentence had it not relied upon the incorrect criminal history point calculation, remand is not required. See id.

II. Ineffective Assistance of Counsel

Chavez-Ramirez also contends that counsel was ineffective for not objecting to the PSR's incorrect calculation of his criminal history points. We disagree because, as discussed above, Chavez-Ramirez was not prejudiced by his counsel's failure to object. See Strickland v. Washington, 466 U.S. 668, 697 (1984) (ineffective assistance of counsel claims may be disposed of solely for lack of prejudice).

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A96-0009-CR (JWS)
Plaintiff,	)Anchorage, Alaska
	)Friday, July 26, 1996
vs.	)8:17 o'clock a.m.
DAVID CHAVEZ-RAMIREZ,	)
	)IMPOSITION OF
Defendant.	) SENTENCE
_____	)

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Probation Officer: JAY RODRIGUEZ
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Interpreter: CHANDLAR THOMPSON
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Transcription Service: SECRETARIAL ASSISTANCE SERVICE
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Proceedings recorded by electronic sound recording. Transcript produced by transcription service.

ANCHORAGE, ALASKA -- FRIDAY, JULY 26, 1996

(On record -- 8:17 o'clock a.m.)

(All parties present; defendant present)

THE CLERK: -- the Honorable John W. Sedwick presiding. Please be seated.

THE COURT: Morning.

THE CLERK: Your Honor, Chandlar Thompson is present telephonically, a Spanish interpreter.

THE COURT: Thank you, Madam Clerk. We're here for proceedings in Case A96-0069 (sic) Criminal, the United States versus David Chavez-Ramirez. Madam Clerk, would you please administer the oath to the interpreter?

THE CLERK: Yes, Your Honor. Mr. Thompson, can you hear me?

THE INTERPRETER: Yes, ma'am.

THE CLERK: Would you please raise your right hand?

THE INTERPRETER: Yes, ma'am.

(CHANDLAR THOMPSON sworn to interpret Spanish to English/English to Spanish)

THE CLERK: And sir, for the record, please state your full name, spell your last name, give your address and telephone number.

THE INTERPRETER: Chandlar Thompson, T-h-o-m-p-s-o-n, U.S Court, Las Cruces, New Mexico, 505-527-6828.

THE CLERK: Thank you.

THE COURT: Ms. Tehan, Mr. Bottini, are you prepared to proceed?

MR. BOTTINI: The Government's ready, Your Honor.

MS. TEHAN: Yes, Your Honor.

THE COURT: The defendant has pled guilty pursuant to a plea agreement to one count of unlawful reentry of an alien convicted of an aggravated felony and previously deported. This is a violation of 8 United States Code, Sections 1326(a) and (b)(2). A presentence report has been prepared and no information was withheld from that report as may sometimes be appropriate under Rule 32 of the Federal Rules of Criminal Procedure.

Mr. Chavez, have you read the presentence report or has it been translated into Spanish for you?

THE DEFENDANT: Yes.

THE COURT: Did you discuss the presentence report with your lawyer?

THE DEFENDANT: Yes.

THE COURT: I have also read the presentence report. I have also read the parties sentencing memoranda and the letters and statements submitted on behalf of Mr. Chavez, including the most recent one which I was given this morning from a Ms. Siford (ph). Based on all of the available information, I now accept the plea agreement in this case.

The defendant has noted objections to one factual allegation in paragraph ten of the presentence report. I find it unnecessary in the proper exercise of my sentencing discretion to consider the information in paragraph ten, and because I won't consider paragraph ten, it is not necessary to resolve the dispute with respect to paragraph ten. Rule 32(c) (1).

With the exception of the disputed matters in paragraph ten, the Court adopts the presentence report's factual statements because they're well supported by the available information.

One issue in contention is whether or not defendant's criminal history category is over-stated as a category six. The defendant argues that his criminal history is more consistent with a category four. I have reviewed the criminal history and considered it in light of the other information reflected both in the presentence report and in the numerous letters and statements submitted attesting to defendant's character and particularly to his strong work ethic.

It is my preliminary finding that the criminal acts shown in the criminal history and the individual's character as reflected in the other sources of information simply cannot justify his classification into either a category six or even a category five.

The defendant has a total of six convictions, only two of which are felonies. One of these is a very serious crime, distribution of cocaine. The other appears to consist of possession of either eight or nine ounces of marijuana. The other crimes generally involve alcohol abuse and driving violations. While the two felonies were drug crimes, the general tenor of this man's record is not enough in this Court's view to place him in the categories ordinarily filled with the most serious offenders we encounter. This seems particularly so in view of his demonstrated work ethic.

The defendant may have engaged in criminal activity with some frequency, but he does not appear to have

made crime his vocation. The defendant's record is a serious one but not serious enough to place him at the upper reaches of the spectrum of criminal conduct. It is therefore my preliminary finding that a category four a category which is still representative of serious criminal activity, better represents the defendant's actual criminal history than a category five or six. However, I would entertain any further argument the Government may wish to make on that issue at this time. Mr. Bottini?

MR. BOTTINI: Thank you, Your Honor. Just very I believe he scored out with thirteen criminal points, which barely put him over the line –

THE INTERPRETER: Could -- excuse me, Your Honor. Could Mr. Bottini stay close to the microphone?

THE CLERK: Or -- Mr. Bottini, you could stand at the podium. That might even be better.

MR. BOTTINI: Sorry about that, Mr. Thompson. Can you -- can you hear me now?

THE INTERPRETER: Loud and clear. Thank you.

MR. BOTTINI: Okay. Your Honor, very briefly. I believe he scored out with thirteen criminal history points, which barely put him over the line into category six, so I understand the Court's reasoning as to a departure for over-representation of the criminal history. The Government would take the position that if the Court is inclined to do that, that it would be more appropriate to de -- depart just one level down to category five, given the nature of the prior convictions and

the -- basically the time frame in which those convictions occurred.

They're all basically within, you know, the last four or five years, and I think that's one of the things that the Sentencing Commission directs the Court in the application notes to consider. They used as an example in there for over-representation a criminal history category that is bumped up due to older convictions being taken into account and basically showing a -- a period of time where a person was not involved in a criminal activity, and that's not the case with Mr. Chavez here.

So the Government would request that if the Court does depart for over-representation, that it -- it do so for just one criminal history category level, which would place him in a five.

THE COURT: Thank -- thank you, Mr. Bottini. I understand your argument and your reference to the note in the Guidelines is well taken. I nevertheless feel considering all of the facts and circumstances that are represented in the presentence report and the other materials considering Mr. Chavez' situation, that even a category five isn't over-representation. He does have one -- what I regard as one very serious conviction and another of some considerable consequence, but the others are minor and they seem to have involved substance abuse to a large extent, so that the -- I think that he simply isn't -- he isn't the kind of criminal that we see here typically in a category five, much less a six.

So it is my finding that category six as well as five would seriously overstate his criminal propensity and that

category four is appropriate, and I make the departure to put him into category four.

The next issue is whether the Court should depart downward pursuant to Guideline Section 5K2.0 on the theory that the sixteen-level enhancement for having been previously deported following conviction for an aggravated felony, which is a -- the subject of Guideline Section 2L1.2(b)(2), should not be applied issue that the here. I'll hear any argument on -- on this parties wish to present to supplement their briefing. Ms. Tehan, do you have any further argument?

MS. TEHAN: No, Your Honor. I -- I think I have said all that I have to say.

THE INTERPRETER: I'm sorry, Ms. Tehan is not coming through. Excuse me, Your Honor.

MS.TEHAN: I -- I believe I've said all that I have to say in my -- in my sentencing memorandum. Thank you.

THE COURT: Thank you, ma'am. Mr. Bottini, did you have anything to add?

MR. BOTTINI: I don't have anything else to add, Your Honor.

THE COURT: As I understand it, the defendant's argument is that Guideline Section 2L1.2(b)(2), which provides for the sixteen-level adjustment, cannot be literally applied here because the defendant was a sort of penny-ante dealer in drugs when he dealt drugs and he was not a kingpin or major player.

It is clear that the fact that Section 2L1.2(b)(2) is applicable does not deprive this Court of authority to depart downward under Section 5K2.0. United States versus Quevos

Gomez cited by both parties and reported at 61 F.3d 749, a Ninth Circuit decision from 1995, makes that clear.

Here, I have already made one adjustment from the indicated Guideline sentencing range by reducing the technically correct criminal history category six to a category of four. While I believe I have further authority under Section 5K2.0 to reduce the offense level if the defendant's circumstances have not been adequately considered in the Guidelines, I do not see a sufficient basis for making any further adjustment here.

The defendant does have not one but two prior drug convictions. One of these convictions involved the sale of cocaine, a very serious offense. Defendant's several criminal convictions are all relatively recent with the exception of the one DWI conviction back in 1987.

The defendant may not be nearly the worst offender to whom the Guideline adjustment applies, but his circumstances do not suggest that he falls into a category of people whose status and situation is not adequately accounted for in the Guidelines providing for the sixteen-level enhancement. Mr. Chavez' history does not show a person who cannot properly be classified as a person who should be separated from United States society for a substantial period of time.

The defendant also requests a downward departure based upon his willingness to be promptly deported. That matter has been addressed by both parties in the briefs. Do either of you have anything to add to what you said in the briefing?

MR. BOTTINI: The Government has nothing to add, Your Honor.

MS. TEHAN: No, Your Honor.

THE COURT: The -- the Government points out that a downward departure on the basis of an agreement to an administrative deportation depends upon the Government's requesting such a departure. Here, the Government opposes such a departure. Moreover, the defendant has been deported before and simply returned to the United States. He does have contacts and relationships in this country such that he would always have an incentive to return. Therefore, I find an adjustment on this basis as unwarranted.

The defendant has asked that his sentence run concurrently with his present state sentence which is a revocation of parole based upon this federal prosecution. Unless I misapprehend the Government's position, it does not appear to oppose this request, and that request appears to me to be both reasonable and appropriate. Mr. Bottini, do you oppose that request?

MR. BOTTINI: I don't oppose the request, Your Honor .

THE COURT:At this point, I would like to entertain -- or let me -- let me just indicate that as a preliminary matter then, it appears that the defendant should be sentenced at a level twenty-one with a criminal history category of four, which would provide an indicated range of fifty-seven to seventy-one months. I'll entertain any further argument counsel may wish to present before hearing from Mr. Chavez.

MR. BOTTINI: I'm sorry, Your Honor. I don't have anything -- anything else to add.

THE COURT: Thank you, sir. Ms. -- Ms. Tehan?

MS. TEHAN: Your Honor, I -- I don't know if I convince you to revisit the Quevos Gomez departure, but --

THE COURT: You -- you -- you can't do that, but you can -- you can address it -- I mean, I -- I'm -- I'm convinced that that's correct. You can address any other issues you feel appropriate, ma'am.

MS. TEHAN: Your Honor, I -- I have nothing further. Thank you.

THE COURT: All right. Mr. Chavez, you have a right to speak before sentence is imposed. If you wish do so, now is the time to speak.

DEFENDANT' S ALLOCUTION

THE DEFENDANT: Do I have to stand up?

THE COURT: No As long as the interpreter can hear you, that's fine.

THE DEFENDANT: Before making your final decision I implore you, as I said in a letter to you where I asked for a fair decision, and I -- I -- I remind you that I have a mother who is in her last days and spends most of her time in the hospital and there are children who depend on me who are in this country and Mexico varying in ages from ten to fifteen and are now having to work because of my absence from them and they're having to -- due to my absence, they are unable to continue going to school.

The fair decision that I ask you for is something that I ask not so much for myself as for them, so I can continue helping them with my support so that they can become productive citizens and that they won't come to commit --make the same mistakes that I have. Thank you.

THE COURT: Thank you, Mr. Chavez. The circumstances you address with respect to your children and your elderly mother are circumstances that the Court appreciates. I don't want your children to make the same mistake you did but I don't want anybody else to. And our society right to be protected from people who, for whatever fall into the kind of conduct that you have in the past.

You were deported from this country once following convictions for involvement in drug trafficking, and yet returned. I understand the human emotional ties you had why you returned, but I -- the risk that you will -- will return and -- and do what you've done in the past is great enough that I think a separation of you from our society for a long enough period of time for you to gather your convictions and act upon them when you're released as opposed to merely think that you would like to is appropriate.

(This portion previously transcribed)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ September 9, 1996

Donna K. Chertkow, Transcriber Date

UNITED STATES DISTRICT

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A96-0009-CR
	) (JWS)
Plaintiff,	)
	) Anchorage, Alaska
vs.	) Friday, July 26, 1996
	) 8:17 o'clock a.m.
DAVID CHAVEZ-RAMIREZ,	)
	) **IMPOSITION OF**
Defendant.	) **SENTENCE**

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

JOSEPEH W. BOTTINI, ESQ.
Assistant U.S. Attorney
U.S. Attorney's Office
222 West 7th Avenue, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

For the Defendant:

VALERIE TEHAN, ESQ.
Assistant Public Defender's Office
550 West 7th Avenue, Suite 1600
Anchorage, Alaska 99501
(907) 271-2277

Probation Officer:	JAY RODRIGUEZ U.S. Probation Office 222 West 7th Avenue, #48 Anchorage, Alaska 99513 (907) 271-5492
Interpreter:	CHANDLER THOMPSON U.S. District Court 200 E. Grigg Las Crues, New Mexico 88001 (505) 527-6828
Court Recorder:	LINDA CHRISTENSEN U.S. District Court 222 West 7th Avenue, #4 Anchorage, Alaska 99513 (907) 271-3163
Transcription Service:	SECRETARIAL ASSISTANCE SERVICE 13682 Sunset View Street Anchorage, Alaska 99515 (907) 348-0477

Proceedings recorded by electronic sound recording. Transcript produced by transcription service.

ANCHORAGE, ALASKA -- FRIDAY, JULY 26, 1996

(On record -- 8:17 o'clock a.m.)

(All parties present; defendant present)

(This portion not transcribed)

IMPOSITION OF SENTENCE

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, David Chavez-Ramirez, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of fifty-seven months. This term of imprisonment shall run concurrently with the term of imprisonment that the defendant is presently serving in the State of Alaska.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. Within seventy-two hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime, shall not possess a firearm or illegal controlled substance, and shall comply with the standard conditions that are included in the Judgment issued by the Court.

Additionally, because the offense occurred after the effective date of the Violent Crime Control and Law Enforcement Act on September 13, 1994, the Court finds that there is a risk of future substance abuse. The defendant shall refrain from unlawful use of controlled substances and submit to one drug test within fifteen days of release on supervised release and at least two periodic drug tests thereafter at the direction of the probation officer.

The defendant shall also comply with the following special conditions:

The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service, and if deported from this country either voluntarily or involuntarily, shall not reenter the United States illegally. Upon any reentry into the United States during the period of court ordered supervision, the defendant shall report to the nearest United States Probation Office within seventy-two hours.

In addition to submitting to drug testing in accordance with the Violent Crime Control and Law Enforcement Act of 1994, the defendant shall participate in a program approved by the United States Probation Officer for substance abuse, which program shall include counseling and/or testing to determine whether the defendant has reverted to the use of drugs or alcohol.

The defendant shall submit to a warrantless search of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner based upon reasonable Suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation.

The defendant shall not reside at any locations without having first advised other residents that the premises may be subject to search pursuant to this condition and without having obtained written acknowledgment of an agreement to allow such searches from other residents. This acknowledgment shall be provided to the U.S. Probation Officer prior to residency.

As a special condition of supervised release, the defendant shall not possess a firearm, destructive device, or other weapon.

The Court finds that the defendant does not have the ability to pay a fine. It is further ordered that the defendant shall pay to the United States a special assessment of fifty dollars, which shall be paid immediately.

It is further ordered that the defendant, David Chavez-Ramirez, remain in the custody of the United States Marshal for the dis -- this district until transported to the Bureau of Prisons or other arrangements are made with the State of Alaska with respect to the housing of Mr. Chavez-Ramirez while he is serving his concurrent sentences.

Are there any other matters we should address this morning before I advise Mr. Chavez-Ramirez of his appeal rights?

MR. BOTTINI: I don't believe so, Your Honor.

MS. TEHAN: Your Honor, I had requested that the Court make a specific recommendation to the Bureau of Prisons to allow Mr. Chavez-Ramirez to participate in the intensive drug treatment, alcohol treatment program, and I believe that without that recommendation, it's less likely that the program would be available to him.

THE COURT: All right. Well, I -- I think the circumstances of Mr. Chavez-Ramirez' case as reflected in the information available to me make that recommendation a very appropriate one, and I do so recommend that he be provided

every opportunity to participate in that program. I think it is important to his rehabilitation.

And Mr. Chavez-Ramirez, I meant what I said. I think that if you spend the time that I've just sentenced you to working on improving your situation when you get out, you're still a young man, you will have many years to provide for your children. There's nothing I can do about your mother's condition, but the children will still need you, and if you take advantage of the drug treatment programs that are available to you, when you emerge from incarceration, you can continue to be and become a better parent to these children who look to you for some support.

And Mr. Chavez-Ramirez, you are advised that you have a right to appeal your sentence on any of the grounds mentioned in 18 United States Code, Section 3742. If you cannot afford to take an appeal, you may ask to do so at public expense by applying for leave to appeal in forma pau peris. If you request it, the Clerk of Court will prepare and file a notice of appeal on your behalf. If you wish to appeal, you must do so within the ten-day time period allowed by Rule 4(b) of the Federal Rules of Appellate Procedure.

Anything further we should do this morning?

MR. BOTTINI: I don't believe so, Your Honor.

MS. TEHAN: No, Your Honor.

THE COURT: Thank you very much, Mr. Thompson.

THE INTERPRETER: Thank you, sir.

THE COURT: We'll adjourn at this time.

THE CLERK: This matter is in recess -- or this matter is adjourned. This Court now stands in recess until matter is nine A.M.

(Whereupon, the proceedings in the above-entitled matter were adjourned at 8:37 o'clock a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ .
Donna K. Chertkow, Transcriber

August 23, 1996
Date

United States District Court
District of Alaska

UNITED STATES OF AMERICA
v.
DAVID CHAVEZ-RAMIREZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:96CR00009-001
A96-00009-01-CR
(JWS)

Valerie Tehan
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1 as **charged in** the **Indictment**

[ ] pleaded nolo contendere to count(s) which was accepted by the court.

[ ] was found guilty on count(s) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 U.S.C. ' 1326 (a) & (b)(2)	Unlawful reentry of alien Previously deported following a Conviction for an aggravated	12/30/1995	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendants Soc. Sec. No.: 531-90-4135
Defendant's Date of Birth: 02/23/1956
Defendant's USM No.; 13136-006
Defendant's Residence Address:
General Delivery
Buena Vista, Guerrero Mexico

Defendant's Mailing Address;
General Delivery
Buena Vista, Guerrero Mexico

Date of Imposition of Judgment: 07/25/1996

Signature of Judicial Officer: /s/
John W. Sedwick
U.S District Judge

Date: 30 July '96 (/s/)

cc: US Attorney, US Marshal, Probation, Federal Public Defender, defendant (by cnsl), Carmen, MJ Roberts, ECR

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 57 month(s)

This term of imprisonment shall run concurrently with the term of imprisonment that the defendant is presently serving in the State of Alaska-

[X] The court makes the following recommendations to the Bureau of Prisons:

that the defendant be allowed every opportunity to participate in the intensive alcohol-drug treatment program.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m./p.m. on _____

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By_____

Deputy, U.S. Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 **year(s)** .

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by

the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below) . The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Page 3.01 Specia1 Conditions of Supervisor

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to

make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service (INS) and, if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Upon any reentry into the United States during the period of court ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.

In addition to submitting to drug testing in accordance with the Violent Crime Control and Law Enforcement Act of 1994, the defendant shall participate in a program approved by the United States Probation Officer for substance abuse, which program shall include counseling and/or testing to determine whether the defendant has reverted to the use of drugs or alcohol.

The defendant shall submit to a warrantless search of his person, residence, vehicle, office, and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition, and without having obtained written acknowledgment of an

agreement to allow such searches from other residents. This acknowledgment shall be provided to the U.S. Probation Office prior to residency.

The defendant shall not possess a firearm, destructive device or other weapon.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following totai criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 50.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A 110, 11OA and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

Totals: $_____ $_____

** Findings for the total amount of losses are required under Chapters 109A, 110,11OA, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for ail payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial

Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

(1) Paragraph 10 facts

(2) Criminal history found to be overstated

Guideline Range Determined by the Court:

Total Offense Level: 21

Criminal History Category: IV

Imprisonment Range: 57 to 71 months

Supervised Release Range: _____ to 3 years

Fine Range: $7,500.00 to $75,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $_____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing

process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 1 09A, 110, 110t and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[X] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following specific reason(s):

Indicated Criminal History Category of VI substantially overstates defendant's criminal activity. Category IV is appropriate.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DAVID CHAVEZ-RAMIREZ	)	
Defendant.	)	No. 1JUS93-541CR,
	)	1002CR

Date of Birth; 2/23/56
Alaska Identification No.: ADL 6307129
ATN NO.: 100112411
Data of Offense: 6/21/93^R
Convicted of: Misconduct Involving a Controlled Substance in the Fourth Degree

JUDGMENT AND DISPOSITION
REVOKING PROBATION

On May 24, 1996, a hearing was held in this matter before the Honorable Larry Weeks Superior Court Judge The defendant appeared in person and by his attorney, Kevin Shores. The State was represented by the District Attorney Richard Svobodny Probation Officer Martie Correa was also present.

The defendant having admitted to having violated the conditions of probation as alleged in the State's Petition to Revoke Probation filed December 26,1995; and

The defendant was originally sentenced in this case to three years in jail with two suspended in 93-541 and two years in jail with one suspended in 93-1002. The defendant having been given opportunities to speak on his own behalf and no sufficient cause being shown or otherwise appearing to the court why sentence should not be imposed;

IT IS ADJUDGED that the suspended portion of the sentence granted on November 22, 1993 is hereby revoked and reimposed.

IT IS ORDERED that the defendant shall serve two years in jail in 1 JUS93-541CR. He shall serve a total of one year in jail in 93-1002CR, and those sentences are consecutive. 110 time is suspended. He has no probation in the state cases after serving the additional one year in jail imposed on this date.

A defendant who has received a sentence of more than two years in jail of unsuspended time may appeal the sentence an the ground that it is excessive. A sentence of any jail time may be petitioned to the Alaska Supreme Court as being excessive. Upon such appeal or petition made by a defendant, the Appellate Courts may increase or decrease the sentence. By appealing or petitioning the sentence, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal the defendant has been placed twice in jeopardy for the same offense.

In the event that an appeal is taken of the conviction or sentence in this case, no stay pursuant to Appellate Rule 206(a)

is effective unless prior application for the stay has bean made to the trial or appellate court and approved.

DONE on May 24, 1996.

/s/
Larry Weeks, Superior
Court Judge

CERTIFICATION

The undersigned certifies that on the 24th day of May, 1996, a true copy of this judgment was provided to Richard Svobodny, District Attorney; Kevin Shores, Defense Attorney; David Chavez-Ramirez, Defendant; Martie Correa, Probation Officer; State Jail; Public Safety, R&I.

/s/
Margie Anderson
Superior Court Secretary

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT

STATE OF ALASKA,)
Plaintiff,)
)
vs.)
)
DAVID CHAVEZ-RAMIREZ,)
Defendant.)
)

Case No. 1JU-S93-541 CR and
Case No. 1JU-S93-1002 CR

TRANSCRIPT OF PROCEEDINGS

May 24, 1996 - Page 1 through Page 18

DISPOSITION

BEFORE THE HONORABLE LARRY R. WEEKS
SUPERIOR COURT JUDGE

Juneau, Alaska
May 24, 1995
11:05 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF: RICHARD A. SVOBODNY, ESQUIRE
District Attorney
District Attorney's Office
Box 110300
Juneau, Alaska 99811

DOC: Ms. Correa

FOR THE DEFENDANT: KEVIN M. SHORES, ESQUIRE
Assistant Public Defender
Alaska Public Defender Agency
Box 110216
Juneau, Alaska 99311

PROCEEDINGS

1JUC-3004
3590

THE CLERK: Please rise. His Honor, the court, the Superior Court is now in session, the Honorable Larry R. Weeks presiding.

THE COURT: Please be seated. We're present in court in the matter of State versus David Chavez-Ramirez, Mr. Chavez-Ramirez is present in the courtroom with his counsel, Mr. Shores; Mr. Svobodny is here for the State, Ms. Correa is

present from Probation. This is the time set for sentencing on probation revocations in 1JU-S93-541 and 1JU-S93-1002. Mr. Svobodny, are you ready to proceed?

MR. SVOBODNY: I am.

THE COURT: Mr. Shores?

MR. SHORES: I am, Your Honor.

THE COURT: I should note for the record that Mr. Shores has an interpreter present for Mr. Chavez-Ramirez. Do you had additions/corrections to the presentence report that you know about Ms. Correa?

MS. CORREA: (indiscernible away from microphone)

THE COURT: Mr. Svobodny?

MR. SVOBODNY: I believe it is incorrect on the second to the last paragraph on the first page that when the defendant found that the police were looking for him he turned himself in. Other than that I don't.

THE COURT: Mr. - - Mr. Shores?

MR. SHORES: Your Honor, Mr. Chavez said that someone told him the police were looking for him and then he went down to - - and turned himself in, but I don't think that it's a material issue in the sentencing.

THE COURT: Do you want to do a testimonial denial, Mr. Svobodny?

MR. SVOBODNY: I don't think so. Do I want to?

THE COURT: Right.

MR. SVOBODNY: No, but I'll make an offer of proof. I was contacted by SEANET, Sergeant Vanderwheel prior to the defendant's arrest. He was identified in Kake by the Kake Police. They didn't know for sure who he was and Sergeant

Vanderwheel flew to Kake so he could make an identification of him at that time that he was arrested. That there was no turning himself in beforehand, and that actually took over about a week period of time. But I agree with Mr. Shores, it's all - - not all that significant.

THE COURT: Do you have witnesses that you want to offer, Mr. Shores?

MR. SHORES: No, Your Honor.

THE COURT: Do you have additions/corrections to he presentence report?

MR. SHORES: I do not.

THE COURT: Comments, Mr. Svobodny?

MR. SVOBODNY: Frankly, Your Honor, I guess I am not prepared to make comments in the - - I think one factor is missing in the court imposing sentence here, and that is what happened as a result of the federal prosecution. Let me just tell you my view.

If, in fact, there's a federal conviction, and I think there probably has been. I knew that that was in the works. I don't know that it's necessary to keep on probation here. If, in fact, there's not a federal conviction and he is not going to be once again deported I guess I have different feelings as to what the sentence would be. I can give you the alternative of what I think should happen in each particular case, but . . . . .

THE COURT: Let's see if we can find out something before we get into that. Mr. Shores, can you tell us what happened to Mr. Chavez-Ramirez. . . .

MR. SHORES: Again, Your Honor, I spoke to Valerie Tehan (ph), Mr. Chavez' federal public defender. He has

changed his plea on the federal offense, entering the country illegally. He is scheduled for sentencing on July 17th. According to Ms. Tehan he falls squarely in the six-year mark under the federal sentencing guidelines. She said that there may be departures to that but she feels that the departure would be upward rather than downward. She didn't say that she had any departures that would move the sentence lower, and that was my last conversation with her. He's set July 17th for sentencing.

MR. SVOBODNY: But I think the court should do is in case 1JU-S93-541 that you should impose a year of the two years suspended and that should end that case. That in the other case, 93-1002 - - 1-0-0-2, that the court should impose a year and that would close out that case, that the time be concurrent. The defendant in this case had two separated incidents. One involving the sale of cocaine, one involving the sale of marijuana. The cocaine sentence would be then a - - ultimately come to a sentence of two years, which is somewhat - - it's in the mid-range of Jackson , which is towards the lower end of that mid-range, but now that there's also a federal conviction I think that the State's connections with Mr. Chavez-Ramirez can best be handled by probation in that case if they're going to put him on probation. I ultimately suspect what they will do is after he's finished serving any time is once again deport him. I think it was anticipated at the time of the original sentencing, at least tacitly agreed to by Mr. Chavez-Ramirez that he wasn't coming back to this community ever again. Coming back to Alaska, that he was returning to his home and that's where he was going

to stay, and he certainly did not do that. Ultimately breaking federal law and turning to this - - to Kake, to Juneau.

I don't - - I think that the probation officer probably hits the nail on the head that maybe he did want to go visit his daughter in Minneapolis but that certainly wasn't what brought him to Kake, and brought him to Juneau. There's - - he may use that as an excuse, and that that was something that he wanted to do at the time but the other parts of his sojourn in the United States can't be based upon that type of claim by Mr. Chavez-Ramirez.

THE COURT: Your recommendation is in 541 that he gets the flat years to do?

MR. SVOBODNY: Right.

THE COURT: And in 1002 that he get two years with six months suspended and that's concurrent?

MR. SVOBODNY: No, it was one year in the second case, 1002, which would - - he had two years with one year suspended, and now he would have two.

THE COURT: So you're saying a flat two years in each case?

MR. SVOBODNY: That's right. A concurrent - - but concurrent to each other so it would be one additional.

THE COURT: Mr. Shores?

MR. SHORES: Your Honor, I believe that the underlying charges shouldn't be looked at again, and that's 95-541, that charge was the delivery of two-tenths of a gram of cocaine. He's already served one year on that case. The other cases before the court was delivery of marijuana which was several ounces of marijuana. I believe it was eight ounces of

marijuana. The amount of cocaine in case number 541 is extremely small. It's a retain quantity under Losver (ph.) v. State. A quantity likened to retailers. I think that should first be considered. Mr. Chavez has served a total of two years on those charges. Then he was deported and he spent seven months in federal custody in Seattle. That added to the time that was - - it was a consequence - - a direct consequence of this conviction, two years and seven months. The presentence report writer and Mr. Svobodny express skepticism as to the reasons Mr. Chavez offers of returning, and that confuses me because I believe that he had very valid reasons to return. Mr. Chavez did the best he's ever done in his life in Kake, Alaska. That was when Mr. Chavez was an independent contractor, he was not only a hard worker himself but he was an employer, he employed people. He may not have had the organizational skills to keep that operation running smoothly. That's why he's back in this country. That's the best he ever did, and he would dearly love to get back to that station in life he once had. It may not be possible. He may not have the foresight to realize that there are so many hurdles that are just insurmountable for him to get back into the permitting process to be an independent contractor again.

(Interpreter in background)

The other reason that he came out - - came back was - - if the court had a chance to review the presentence report his last forest contracts happened around the same time he was arrested on this underlying drug charge. One - - he subcontracted with another contractor, he was owed $15,000.00

. . . .

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THE COURT: Just a moment, excuse me, we have a technical problem.

MR. SHORES: All right.

THE CLERK: (indiscernible).

THE COURT: Okay, go ahead, excuse me.

MR. SHORES: On one contractor he was stiffed, according to the presentence report for $15,700.00; another 12,000 was owed to him by another person. Put him in a bad situation as far as having to pay the employees that worked for him. Mr. Chavez would like to collect that money. He doesn't see any way to collect it. That's one reason he came back to Kake. That is a very significant amount of money for Mr. Chavez. It would keep him going for a very long time and help him satisfy other debts that he owes.

If the court had a chance to review the records, the defense submitted letters back at the original sentencing, letters from people who worked with Mr. Chavez. A Tom Penz (ph) from the U.S. Forest Service, said he was a very hard worker, he was fast, he completed all his contracts on time. I called Mr. Penz to - - just to talk to him about Mr. Chavez and asked him whether or not this debt was still outstanding and Mr. Penz said, yes, but he didn't think that it - - he had a very good change of collecting it from his particular party.

Other letters were in there from people in the forest - - reforestation contracting business. They all said that he was a very hard worker. His organizational skills were not high, but he completed his contracts. Okay. I guess one - - I should comment on the letter that was attached to the presentence

report. That is a letter from someone soliciting or asking - - I believe the last words is there a chance you can move some merchandise for me, and I spoke to Mr. Chavez about that. He has been trying for a long time to divorce himself from that world. I think that the presentence report hit it right originally when they said that Mr. Chavez was immersed in the drug culture of Juneau. He was, and that was the kind of dealing that was going on. Meeting people at parties, getting - - talking to one person and getting another person drugs.

As the court knows, one of the hardest things for someone to do is to - - or one of the biggest hurdles is to disassociate yourself from people that still use drugs. Mr. Chavez was trying to do that when he was back in Kake, he was going to Alcoholics Anonymous meetings with Loren Jackson who ran informal meetings. He's continued to do substance abuse classes and anger management in - - while he's been in Lemon Creek, and while he's been in Cook Inlet. He's trying not to waste his time. Again, on the federal sentencing guideline, as the court may know, there's very movement either way on those federal cases. If you're in the box generally you get that unless one side can prove departures. All in all, when - - if you count six years on the federal case plus two years on the state case, seven month, it looks to me like his involvement in Juneau briefly will probably cost him eight to ten years of his life.

Imposing six months as suggested by the probation officer or the year, as I understand it, by the prosecutor, I don't see that that accomplishes any of the goals of sentencing. The prosecutor would probably say that it accomplishes some

measure of deterrence of Mr. Chavez and others. I don't think that accomplishes that because it just - - it pales in comparison to the sanction that's going to be imposed in the federal case for the very same conduct. This is a first probation revocation. There has been no other violations of probation. We're talking about one law violation that has enormous consequences, independent of the probation revocation.

The underlying offense was not amongst the least - - the most serious offense, it's not an organized effort. I've commented on that before. There's virtually no need to confined the defendant in this case as the prosecutor said, he's likely to be confined in the federal case for a very long time.

And it's gong to cost the State of Alaska money to incarcerate this person when he's going to be incarcerated on federal charges. Those are basically my comments, and noting again that this is the first revocation, I would urge the court to reimpose and resuspend jail time. Mr. Chavez would like to gain legal entry into the country again. That's something that he could do within five years after deportation. It may be way down the road but if he gets himself an immigration lawyer, five years after a deportation he's going to be able to apply to come back to the country. He wishes to remain on supervised probation, doesn't wish to be closed out.

I would ask the court to reimpose and resuspend. And Mr. Chavez may wish to be heard from.

THE COURT: Mr. Svobodny?

MR. SVOBODNY: The court may recall that Mr. Chavez-Ramirez went through three prior deportation proceedings, starting I think way back in '78, and there were

two - - in the 80's - - I don't think it's realistic for him to expect that at this time he's - - that he's going to be somehow legally admitted to the United States.

The arguments that this was not an organized effort - - Mr. Shores forgets that other pertinent information portions of the first presentence report where there were four other drug sales. The court heard a number of cases that revolved around this Cordova Heights condo and the people dealing drugs out of that. I don't think it was organized in the sense that people think about organized crime, but it was certainly a group of people that involved Mr. Chavez-Ramirez distributing drugs in Juneau.

As far as the cost to the State of Alaska, certainly it's going to cost the State of Alaska some money to incarcerate him, just like it cost the State of Alaska money to incarcerate everybody else, but it's also going to cost the state in other intangibles if we don't teach people that they have to obey the law, if we don't teach people that they shouldn't distribute drugs, if we don't teach people that they have to follow conditions of probation.

I think it's wearing blinders or closing one's eyes when - - to think that Mr. Chavez-Ramirez is not back involved in dealing drugs in Kake. This letter talks - - it's from somebody else, I agree, its a solicitation letter, but your name has been given to me, Mr. Chavez-Ramirez, by these other people that I've been dealing with before as somebody that I can get a connection in Alaska with. I mean that certain seems to me (indiscernible) Mr. Chavez-Ramirez to indicate that he's still involved in the distribution of drugs, and I think it very

interesting though that it's - - that somebody can find - - has an address for him, that they can find him in Kake, Alaska without him being more involved - - I mean he's got to be involved with these people so that they can give an address to the person who wrote the letter. It's just not - - there - - somehow there's been a connection between one set of drug dealers and Mr. Chavez-Ramirez who has been convicted of distributing drugs.

THE COURT: Mr. Chavez, you have the right to say anything that you want to say.

(Interpreter to Mr. Chavez-Ramirez)

THE COURT: If you want to say something . . . . .

MR. CHAVEZ-RAMIREZ: (to interpreter)

INTERPRETER: He says he doesn't want to say anything.

MR. SHORES: Your Honor, could I be permitted one more comment? I think Mr. Svobodny misreads the letter and I hope the court has read that and understood what it says. It is a letter from a friend of David's who said that he is involved with some people in I think Los Angeles. That's my only comment.

THE COURT: I have read the presentence report and all the attachments to it, including the letters, and I've read the old presentence report, I've read the comment from Mr. Penz. In imposing a sentence the court is supposed to look at the original charges and consider the behavior since the time of the original offense. The court is supposed to then consider the same criteria as imposing a sentence originally . The court is supposed to consider rehabilitation, deterrence of this offender and deterrence of other offenders in the community. The court is supposed to consider isolation an reaffirming societal norms.

The court is suppose to impose a sentence in this case like other sentences imposed in other cases with similar defendants and similar offenses.

I think to impose the sentence that Mr. Svobodny recommends would actually ended up with mean - -being Mr. Chavez being released to the federal authorities immediately because previously the sentences were concurrent - - or consecutive in 1002 and 541. And I think that the conduct coming back in and violating the federal law is deserving of punishment and I will impose additional jail time.

I think it's important to do that to deter Mr. Chavez and to deter other people in the community. However, I also have to think - - I think that I have to consider the federal sentence in imposing a sentence.

Mr. Chavez, will you stand. In 93-541 it will be the judgment of the court that you be sentenced to serve two years in jail. I'm not going to suspend any of that time. In 93-1002 I'm going to sentence you to serve one year in jail. The time is to be consecutive. You have an additional year in jail from what you originally had to serve. You've served about six month of that since your arrest, and you'll get credit for time served for that time served. I think you have a right to appeal your sentence as being too severe. If you do, the State may cross appeal and the Court of Appeals can impose a more severe as well as a less severe sentence. You won't be on probation after you're released from the state charges. I should say you won't be on state probation, you could be on federal probation. Do you have any question, Mr. Chavez?

MR. SHORES: Your Honor, I do.

THE COURT: Go ahead.

MR. SHORES: In 541 I believe the original sentence was three years with two years suspended, and the court was imposing two years to serve on that?

THE COURT: So he's got an additional year to serve in that case. I'm giving him a flat two years.

MR. SHORES: Okay, a flat two years. And the other one, S93-1002 there was one year hanging and you're imposing that year?

THE COURT: No, I'm not imposing that, I'm reducing his sentence in 1002.

MR. SHORES: Okay.

THE COURT: Isn't that right, Mr. Svobodny?

MR. SVOBODNY: Well, I guess you are reducing it since you're doing away with his probation on that, year.

THE COURT: And the suspended . . . .

MR. SVOBODNY: I mean I was going to say it came out of the same but it's technically I think a reduction in sentence.

MR. SHORES: Okay.

THE COURT: Questions, Mr. Svobodny?

MR. SVOBODNY: NO.

THE COURT: Ms. Correa?

MS. CORREA: (indiscernible)

THE COURT: You may be excused. Go off …

(Off Record)

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END OF REQUESTED PORTION

CERTIFICATE

SUPERIOR COURT)
) ss.
STATE OF ALASKA)

I, Audrey Krovchuk, hereby certify:

(1) That the foregoing pages numbered 1 through 18 contain a full, true and correct transcript of proceedings in cause no. 1JU-S93-541 and S93-1002 Cr., State of Alaska v. David Chavez-Ramirez, transcribed by me to the best of my knowledge and ability from tapes identified as follows:

Tape No.	Log Numbers
1JUC-3004	3590-end
1JUC-3003	0003-451

(2) That I have been certified for transcript services by the Alaska Court System prior to January 1, 1993.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 15th day of August, 1996.

/s/_____.
Audrey Krovchuk, Court Reporter
Notary Public in and for Alaska
My commission expires 10/4/99

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,	)
Plaintiff,	)
	)
vs.	)
	)
DAVID CHAVEZ-RAMIREZ	)
Defendant.	) No. 1JUS93-541CR,
	) 1002CR

MEMORANDUM

The defendant in this case had probation revoked on the two cases above on petition of the State. The court imposed an additional one year to serve on one case and terminated probation on the other case. The defendant now moves for correction of the judgment as the Department of Corrections is interpreting the judgment in the way the court intended. The court in the judgment[1] and in the transcript of sentencing[2]

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[1] The pertinent part of the judgment reads:

> The defendants originally sentenced in this cane to three years in jail with two suspended in 93-541 and two years in jail with one suspended in 93-1002.
>
> IT IS ADJUDGED that the suspended portion of the sentence granted on November 22. 1993 in hereby revoked and reimposed.

(continued...)

(...continued)

> IT IS ORDERED that the defendant shall serve two years in jail in 1 JUS93-S41CR. He shall serve a total of one year in jail in 93-1002CR, and those sentences are consecutive. No time in suspended. He has no probation in the state cases after serving the additional one year in jail imposed on this date. (emphasis added)

[2] The transcript of sentencing reads in part:

Mr. Chavez, will you stand. In 93-541 it will be the judgment of the court that you be sentenced to serve two years in jail. I'm riot going to suspend any of that time. In 93-1002 I'm going to sentence you to serve one year in jail. The time is to be consecutive. You have an additional year in jail from what you originally had to serve. You've served about six months of that time since your arrest, and you'll get credit for time served for that time served. I think you have a right to appeal your sentence as being too severe. If you do, the State may cross-appeal and the Court of Appeals can impale a more severe as well as a less severe sentence. You won't be on probation after you're released from the state charges. I should say you won't be on state probation, you could to on federal probation. Do you have any questions, Mr. Chavez?

Defense Counsel: Your Honor, I do.

The Court: Go ahead.

(continued...)

available to the Department indicated its intention to impose one additional year of incarceration above what he had previously served. That is all. The defendant is to receive credit for time served.

Dated September 23, 1996

/s/
Larry Weeks
Superior Court Judge

(...continued)

Defense Counsel: In 541 I believe the original sentence was three years with two years suspended, and the court was imposing two years to serve on that?

The Court: So he's got an additional year to serve in that case. I'm giving him a flat two years.

Defense Counsel: Okay, a flat two years. And the other one, S93-1002 there was one year hanging and you're imposing that year?

The Court: No, I'm not imposing that, I'm reducing his sentence in 1002.

(Emphasis added)